AMRUTHA N. JINDAL
California State Bar No. 274500
FEDERAL DEFENDERS OF SAN DIEGO, INC.
225 Broadway, Suite 900
San Diego, CA 92101-5008
(619) 234-8467/Fax: (619) 687-2666
E-Mail: Amrutha_Jindal@fd.org

Attorneys for Paulino Herrera-Hernandez

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(HONORABLE LARRY A. BURNS)

UNITED STATES OF AMERICA, Plaintiff, v. **PAULINO HERRERA-HERNANDEZ,** Defendant.	**Case No. 14-CR-3571-LAB** **DATE: January 26, 2015** **TIME: 2:00 p.m.** **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTIONS**

I.

STATEMENT OF FACTS

To the extent the following statement of facts is based upon materials provided by the government, Mr. Herrera-Hernandez reserves the right to take a contrary position at motion hearings and trial. The facts alleged in these motions are subject to amplification and/or modification at the time these motions are heard.

On or about November 15, 2014, Mr. Herrera-Hernandez was arrested for a violation of 8 U.S.C. §1326(a) and (b), Removed Alien Found in the United States. The defense has received 66 pages of discovery from the government.

These motions follow.

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II.

MOTION TO COMPEL DISCOVERY/PRESERVE EVIDENCE

(1) The Defendant's Statements. The government must disclose to the defendant all copies of any written or recorded statements made by the defendant; the substance of any statements made by the defendant which the government intends to offer in evidence at trial-either in its case-in-chief or in rebuttal[1]; any response by the defendant to interrogation; the substance of any oral statements which the government intends to introduce at trial and any written summaries of the defendant's oral statements contained in the handwritten notes of the government agent; any response to any *Miranda* warnings which may have been given to the defendant; as well as any other statements by the defendant.[2] The Advisory Committee Notes and the 1991 Amendments to Rule 16 make clear that the Government must reveal all of the defendant's statements, whether oral or written, regardless of whether the government intends to make any use of those statements.

(2) Arrest Reports and Notes. The defendant also specifically requests that the government turn over all arrest reports, notes and TECS records not already produced that relate to the circumstances surrounding his arrest or any questioning. This request includes, but is not limited to, any rough notes, records, reports, transcripts, referral slips, or other documents in which statements of the defendant or any other discoverable material is contained. Such material is discoverable under Fed. R. Crim. P. 16(a)(1)(A) and *Brady v. Maryland*. Additionally, the government must produce arrest reports, investigators' notes, memos from arresting officers, sworn statements, and prosecution reports pertaining to the defendant.[3]

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[1] *See* Fed. R. Crim. P. 16

[2] Fed. R. Crim. P. 16(a)(1)(A). Of course, any of the defendant's statements, which are exculpatory, must be produced, as well. *See Brady v. Maryland*, 373 U.S. 83 (1963).

[3] *See* Fed. R. Crim. P. 16(a)(1)(B) and (C), 26.2 and 12(I); *United States v. Harris*, 543 F.2d 1247, 1253 (9th Cir. 1976) (original notes with suspect or witness must be

(3) Brady Material. The defendant requests all documents, statements, agents' reports, and tangible evidence favorable to the defendant on the issue of guilt and/or which affects the credibility of the government's case.[4] Under *Brady*, *Kyles* and their progeny, impeachment, as well as exculpatory evidence, falls within the definition of evidence favorable to the accused.[5] This includes information obtained from other investigations which exculpates the defendant.

(4) Any Information That May Result in a Lower Sentence Under The Guidelines. The government must produce this information under *Brady v. Maryland*. This request includes any cooperation or attempted cooperation by the defendant, as well as any information, including that obtained from other investigations or debriefings, that could affect any base offense level or specific offense characteristic under Chapter Two of the Guidelines. The defendant also requests any information relevant to a Chapter Three adjustment, a determination of the defendant's criminal history, and information relevant to any other application of the Guidelines.

(5) The Defendant's Prior Record. The defendant requests disclosure of any prior record.[6]

(6) Any Proposed 404(b) Evidence. The government must produce evidence of prior similar acts under Fed. R. Crim. P. 16(a)(1)(C) and Fed. R. Evid. 404(b) and 609. In addition, "upon request of the accused, the prosecution . . . shall provide reasonable notice in advance of trial . . . of the general nature" of any evidence the government proposes to introduce under Fed. R. Evid. 404(b) at trial and the purpose for which introduction is

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preserved); *see also United States v. Anderson*, 813 F.2d 1450, 1458 (9th Cir. 1987) (reaffirming *Harris*' holding).

[4] *Kyles v. Whitley*, 514 U.S. 419 (1995).

[5] *See also United States v. Bagley*, 473 U.S. 667 (1985); *United States v. Agurs*, 427 U.S. 97 (1976).

[6] Fed. R. Crim. P. 16(a)(1)(B).

sought. This applies not only to evidence which the government may seek to introduce in its case-in-chief, but also to evidence which the government may use as rebuttal.[7] The defendant is entitled to "reasonable notice" so as to "reduce surprise," preclude "trial by ambush" and prevent the "possibility of prejudice."[8] The defendant requests such reasonable notice at least four weeks before trial so as to adequately investigate and prepare for trial.

(7) Evidence Seized. The defendant requests production of evidence seized as a result of any search, with or without a warrant.[9]

(8) Henthorn Material. The defendant requests that the Assistant United States Attorney assigned to this case oversee a review of all personnel files of each agent involved in the present case for impeachment material.[10] At a minimum, the prosecutor has the obligation to inquire of his agents in order to ascertain whether or not evidence relevant to veracity or other impeachment exists.

(9) Tangible Objects. The defendant requests the opportunity to inspect and copy, as well as test, if necessary, all other documents and tangible objects, including photographs, books, papers, documents, fingerprint analyses, vehicles, or copies of portions thereof, which are material to the defense or intended for use in the government's case-in-chief or were obtained from or belong to the defendant.[11] Specifically, to the extent they were not already produced, the defendant requests color copies of all photographs in the government's possession, including, but not limited to, the defendant and any other photos taken in connection with this case.

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[7] *See United States v. Vega*, 188 F.3d 1150 (9th Cir. 1999).

[8] *Id.; United States v. Perez-Tosta*, 36 F.3d 1552, 1560-61 (11th Cir. 1994).

[9] Fed. R. Crim. P. 16(a)(1)(E).

[10] *Kyles*, 514 U.S. at 419; *United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991); *United States v. Lacy*, 896 F. Supp. 982 (N.D. Ca. 1995).

[11] Fed. R. Crim. P. 16(a)(1)(E).

(10) Expert Witnesses. The defendant requests the name, qualifications, and a written summary of the testimony of any person that the government intends to call as an expert witness during its case in chief.[12] The defense requests that notice of expert testimony be provided at a minimum of four weeks prior to trial so that the defense can properly prepare to address and respond to this testimony, including obtaining its own expert and/or investigating the opinions and credentials of the government's expert. The defense also requests a hearing in advance of trial to determine the admissibility of qualifications of any expert.[13]

(11) Evidence of Bias or Motive to Lie. The defendant requests any evidence that any prospective government witness is biased or prejudiced against the defendant, or has a motive to falsify or distort his or her testimony.

(12) Impeachment Evidence. The defendant requests any evidence that any prospective government witness has engaged in any criminal act whether or not resulting in a conviction and whether any witness has made a statement favorable to the defendant.[14]

(13) Evidence of Criminal Investigation of Any Government Witness. The defendant requests any evidence that any prospective witness is under investigation by federal, state or local authorities for any criminal conduct.

(14) Evidence Affecting Perception, Recollection, Ability to Communicate, or Truth Telling. The defense requests any evidence, including any medical or psychiatric report or evaluation, that tends to show that any prospective witness' ability to perceive, remember, communicate, or tell the truth is impaired, and any evidence that a witness has ever used narcotics or other controlled substance, or has ever been an alcoholic.

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[12] Fed. R. Crim. P. 16(a)(1)(G).

[13] *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) (trial judge is "gatekeeper" and must determine reliability and relevancy of expert testimony and such determinations may require "special briefing or other proceedings . . ..").

[14] *See* Fed. R. Evid. 608, 609 and 613; *Brady v. Maryland*.

(15) Jencks Act Material. The defendant requests production in advance of trial of all material, including any tapes, which the government must produce pursuant to the Jencks Act.[15] Advance production will avoid the possibility of delay at the request of the defendant to investigate the Jencks material. A verbal acknowledgment that "rough" notes constitute an accurate account of the witness' interview is sufficient for the report or notes to qualify as a statement under section 3500(e)(1).[16]

(16) Giglio Information. Pursuant to *Giglio v. United States*, 405 U.S. 150 (1972), the defendant requests all statements and/or promises, express or implied, made to any government witnesses, in exchange for their testimony in this case, and all other information which could arguably be used for the impeachment of any government witnesses.

(17) Agreements Between the Government and Witnesses. In this case, the defendant requests identification of any cooperating witnesses who have committed crimes, but were not charged, so that they may testify for the government in this case. The defendant also requests discovery regarding any express or implicit promise; understanding; offer of immunity; past, present, or future compensation; or any other kind of agreement or understanding, including any implicit understanding relating to criminal or civil income tax, forfeiture or fine liability between any prospective government witness and the government (federal, state and/or local). This request also includes any discussion with a potential witness about, or advice concerning, any contemplated prosecution, or any possible plea bargain, even if no bargain was made, or the advice not followed.

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[15] 18 U.S.C. § 3500; Fed. R. Crim. P. 26.2.

[16] *Campbell v. United States*, 373 U.S. 487, 490-92 (1963); *see also United States v. Boshell*, 952 F.2d 1101 (9th Cir. 1991) (holding that, where an agent goes over interview notes with subject, interview notes are subject to Jencks Act).

Pursuant to *United States v. Sudikoff*,[17] the defense requests all statements made, either personally or through counsel, at any time, which relate to the witnesses' statements regarding this case, any promises -- implied or express -- regarding punishment/prosecution or detention of these witnesses, any agreement sought, bargained for or requested, on the part of the witness at any time.

(18) Informants and Cooperating Witnesses. To the extent that there was any informant, or any other tip leading to a TECS hit in this case, the defendant requests disclosure of the names and addresses of all informants or cooperating witnesses used, or to be used, in this case, and in particular, disclosure of any informant who was a percipient witness in this case or otherwise participated in the crime charged against the defendant. The government must disclose the informant's identity and location, as well as the existence of any other percipient witness unknown or unknowable to the defense.[18] The government must disclose any information derived from informants which exculpates or tends to exculpate the defendant.

(19) Bias by Informants or Cooperating Witnesses. The defendant requests disclosure of any information indicating bias on the part of any informant or cooperating witness.[19] Such information would include what, if any, inducements, favors, payments or threats were made to the witness to secure cooperation with the authorities.

(20) Inspection and Copying of A-Files. The defendant requests that this Court order the government to make all A-Files connected to this case available for inspection and copying.

(21) Residual Request. The defendant intends, by this discovery motion, to invoke his rights to discovery to the fullest extent possible under the Federal Rules of Criminal Procedure and the Constitution and laws of the United States. The defendant

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[17] 36 F.Supp.2d 1196 (C.D. Cal. 1999)

[18] *Roviaro v. United States*, 353 U.S. 53, 61-62 (1957).

[19] *Giglio v. United States*.

requests that the government provide her attorney with the above-requested material sufficiently in advance of trial to avoid unnecessary delay prior to cross-examination.

III.

MOTION FOR PRESERVATION OF EVIDENCE

The defendant specifically requests the preservation of any and all physical evidence that may be destroyed, lost, or otherwise put out of the possession, custody, or care of the government and which relates to the arrest or the events leading to the arrest in this case. This request includes, but is not limited to, any vehicles and/or container seized, any personal effects of the defendant; any cell phones seized, and the agents' notes of any interrogation.

IV.

MOTION FOR LEAVE TO FILE FURTHER MOTIONS

Mr. Herrera-Hernandez and defense counsel have received limited discovery. Consequently, defense counsel needs more discovery, and more time to investigate the case before presenting Mr. Herrera-Herandez's further motions to the Court. As new information surfaces, the defense may find it necessary to file further motions, or to supplement existing motions with additional facts.

V.

CONCLUSION

For the reasons stated above, Mr. Herrera-Hernandez moves this Court to grant his motions.

Respectfully submitted,

DATED: January 15, 2015

s/ Amrutha N. Jindal
AMRUTHA N. JINDAL
Federal Defenders of San Diego, Inc.
Attorneys for Paulino Herrera-Hernandez

CERTIFICATE OF SERVICE

Counsel for Defendant certifies that the foregoing pleading is true and accurate to the best of her information and belief, and that a copy of the foregoing document has been served this day upon:

Assistant U.S. Attorney via ECF/NEF

Respectfully submitted,

DATED: January 15, 2015

s/ Amrutha N. Jindal
AMRUTHA N. JINDAL
Federal Defenders of San Diego, Inc.
Attorneys for Paulino Herrera-Hernandez